Supreme Court, U. S.
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No. 76-17

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The First National Bank of Chicago petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case entered on May 27, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended as Appendix A. The opinion of the District Court, reported in 409 F. Supp. 1167 (N.D. Ill. 1975), is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should the congressional doctrine of "competitive equality", as enunciated by this Court in *Plant City**, be frustrated by the failure below to construe the McFadden Act** in accordance with the actual competitive situation between national and state banks in each particular state?

STATUTES INVOLVED

Federal Statutes:

12 U.S.C. §36(f)

12 U.S.C. §36(c)

Illinois Statutes:

Ill. Rev. Stat., ch. 16½, §102 (1975)

Ill. Rev. Stat., ch. 16½, §105(11) (1975)

Ill. Rev. Stat., ch. 16½, §106 (1975)

The relevant statutes are quoted in full in Appendix C.

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* *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*).

** 12 U.S.C. §36.

STATEMENT

Petitioner, The First National Bank of Chicago ("First National"), is a national banking association organized under the National Bank Act (12 U.S.C. §21 *et seq.*) with its main office in Chicago, Illinois. In 1975, First National established its "Bank at Work" program, designed to encourage employees and employers to deposit salary payments directly into individual employee bank accounts with First National. In furtherance of this program, First National established and operated five customer-bank communication terminals ("CBCT's") at four employer locations in the City of Chicago and in nearby suburban municipalities.

These CBCT's are unmanned electronic devices, which permit a customer by insertion of a plastic card into the CBCT to initiate: (i) the withdrawal of cash from his checking or savings account, (ii) cash advances on a credit card account, (iii) the deposit of checks or cash to his checking or savings account, (iv) the transfer of funds between checking and savings accounts, and (v) the payment of First National installment loans or credit card charges and the payment of certain utility bills.

On September 22, 1975, the State of Illinois on the relation of the Illinois Commissioner of Banks and Trust Companies ("Commissioner"), filed with the United States District Court for the Northern District of Illinois a complaint seeking a declaratory judgment that First National's CBCT's are branch banks, as defined under the McFadden Act (12 U.S.C. §36(f)), and consequently prohibited to national banks in Illinois under 12 U.S.C. §36(c) and §6 of the Illinois Banking Act (Ill. Rev. Stat., 1975, Ch. 16½, §106). The Commissioner's complaint also

sought an injunction barring establishment and operation of First National's CBCT's. The District Court below held on December 29, 1975, in its Memorandum Opinion that First National's CBCT's are not branch banks insofar as the cash withdrawal and bill payment functions are concerned, but are branches under 12 U.S.C. §36(f) insofar as the cash advance, deposit initiation and transfer functions are concerned. On appeal and cross-appeal, the United States Court of Appeals for the Seventh Circuit held that First National's CBCT's constitute branch banks in all respects, including the cash withdrawal and bill payment functions.*

The decisions of the District Court and the Court of Appeals below also apply to the companion case of *State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies* v. *Continental Illinois National Bank and Trust Company of Chicago,* which involves not only unmanned CBCT's but also manned point-of-sale ("POS") terminals located in Chicago area grocery stores. First National respectfully refers the Court to the Petition for a Writ of Certiorari (No. 75-1900) filed with the Court on June 30, 1976, by Continental Bank ("Continental Petition") in its related case for further discussion of the operation of CBCT's and the more general subject of electronic funds transfer.

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* It should be noted that on July 8, 1976, the Chicago City Council enacted an ordinance, which permits banks located in Chicago to establish and operate an unlimited number of CBCT's in Chicago. This ordinance should have no bearing on this case because some of First National's CBCT's are located outside of the city limits of Chicago and are not covered by the ordinance.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Below Decided an Important Issue of Federal Law in a Manner Contrary to a Prior Decision of This Court.

In holding that CBCT's are "branches" within the meaning of 12 U.S.C. §36(f), the Court of Appeals below was interpreting the key provision of an important federal statute. That statute controls the competitive relationship between national and state banks insofar as branching is concerned; it is the cornerstone on which the dual system of national and state banks in the United States rests. The decision below will have significant consequences for the national banking system, in view of the widespread and growing use of CBCT's by both national banks and the state banks with which they compete. Thus, even if the decision below were correct, it has such broad implications as clearly to warrant review by this Court.

The fact is, however, that the Court of Appeals' decision, and the District of Columbia Circuit's *IBAA** opinion on which it relied, were manifestly incorrect in concluding that the statutory term "branch" encompasses CBCT's. As the Continental Petition has shown, such a holding cannot be reconciled with this Court's insistence in the *Plant City* case that Congress intended national and state

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* *Independent Banker's Ass'n. of America* v. *Smith*, 402 F.Supp. 207 (D.D.C. 1975), *aff'd.* No. 75-1786 (D.C. Cir., March 23, 1976) (*"IBAA"*). For the convenience of the Court copies of the *IBAA* opinion have been lodged with the Clerk.

bank branching to be governed by a principle of "competitive equality." We agree with Continental Bank's position, and, to avoid repetition, we respectfully refer the Court to the Continental Petition on that point.

II.

The decision of the Court of Appeals below is in conflict with the doctrine of "competitive equality" enunciated by this Court in Plant City.

This Court held in *Plant City* that the definition of "branch" under §36(f) must be construed so as not to "frustrate the congressional intent" that there be competitive equality between national and state banks. (396 U.S. at 134.) The Court's finding that the operation by a national bank in Florida of an armored car service and an off-premises receptacle, both of which took deposits from customers, constituted branch banking under §36(f) was required in order to preserve competitive equality, because Florida absolutely prohibited any type of off-premises activity to state banks in that state. (396 U.S. at 124-25). Had Florida state banks been permitted (in some manner other than pursuant to an explicit state statute, *e.g.*, administrative ruling or tolerance) to operate armored car services and stationary receptacles similar to those operated by the Florida national bank, the principle of maintaining competitive equality would have required that the Florida national bank also be permitted to use such facilities. Therefore, to preserve competitive equality insofar as branching is concerned, it is necessary to consider the actual competitive situation in a particular state before determin-

ing whether a particular off-premises facility is a "branch". Such a consideration is the underpinning of the *Plant City* decision, but the Court of Appeals below wholly failed without explanation to consider the actual competitive situation in Illinois.

(A) The Commissioner has tacitly or expressly approved for operation by Illinois state banks CBCT and other systems which are functionally indistinguishable from First National's CBCT system.

In Illinois there is no judicial authority that CBCT's are branches under state law and thus prohibited to state banks. Indeed, as First National has documented in the uncontroverted record of this case, the Commissioner has given his express or tacit approval to at least two off-premises systems operated by Illinois state banks. These systems are functionally indistinguishable from First National's CBCT system in that they allow customers to initiate deposits and to obtain cash advances and withdrawals away from a bank's premises. The existence of these systems will work to First National's competitive disadvantage if First National is prohibited from operating its CBCT's.

The first such off-premises system is operated by a group of banks in Illinois. (Four of the five banks in the group are Illinois state banks.) This system, which has operated without apparent challenge by the Commissioner, allows customers of any one of the participating banks to use CBCT's located at any of the other participating banks to make cash withdrawals from their checking accounts and also to obtain cash advances on special Master

Charge cards. One can only conclude from the Commissioner's failure to act on this matter, that the Commissioner deems to be lawful the cash withdrawal activities of, and the disbursement of cash advances by, Illinois state banks via off-premises CBCT's.

The other off-premises system operated by an Illinois state bank permits a customer to make off-premises deposits into his bank account through a savings and loan association. By a ruling letter dated January 27, 1975,* the Commissioner has expressly sanctioned this system. This letter evidences the Commissioner's clear policy to administer the Illinois Banking Act to permit off-premises deposit initiation systems. The ability of Illinois state banks to operate such systems under the Commissioner's administrative fiat, while First National is prohibited from so doing under the broad construction of the 12 U.S.C. §36(f) branch definition imposed on it by the Court of Appeals below (and indeed on all national banks by the *IBAA* opinion), places first National at a competitive disadvantage vis-a-vis state banks.

Taken together, these off-premises systems perform the three primary functions of First National's CBCT's—cash withdrawal, cash advance and deposit initiation. By his administrative policy permitting these off-premises state bank activities, the Commissioner has construed and enforced the Illinois Banking Act so as not to include these systems within the definition of "branch" contained therein. Therefore, in order to preserve the "competitive equality" between state and national banks in Illinois with

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* Letter dated January 27, 1975, signed by Bernard R. Rabens, the Commissioner's Chief Examiner in Chicago, a part of the record in this case.

respect to these types of off-premises activities, 12 U.S.C. §36(f) should likewise be construed to exclude First National's CBCT's from the definition of branch.

(B) Section 5(11) of the Illinois Banking Act* will automatically permit Illinois state banks to establish and operate CBCT's if national banks in Illinois are permitted to do so.

In addition to the Commissioner's actual administration of the Illinois Banking Act to permit CBCT's and analogous systems to state banks, the Illinois Banking Act itself contains a provision which will insure that Illinois state banks will be permitted to operate CBCT's if national banks in Illinois are permitted to do so under the National Bank Act. Section 5(11) of the Illinois Banking Act provides that, notwithstanding any other provision of that Act, Illinois state banks may do any act authorized to national banks under federal law. Because of the existence of §5(11) in Illinois,** "competitive equality" is assured in Illinois if First National is permitted to operate its CBCT's under federal law, *i.e.*, if First National's CBCT's are deemed not to be branches under 12 U.S.C. §36(f).

The Court of Appeals below did not consider the competitive situation which exists in Illinois as a consequence of §5(11) of the Illinois Banking Act and of the Commissioner's policy with respect to the operation of off-premises systems by Illinois state banks. That failure to consider the actual competitive situation in Illinois places national banks at a competitive disadvantage compared

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* Ill. Rev. Stat., 1975, ch. 16½, §105(11), quoted in full in Appendix C.

** Several other states have similar provisions in their banking statutes. *See* Continental Petition at 16.

with Illinois state banks. It is of major importance to the national banking system, and to all national banks, each of which is directly affected by the actual competitive situation in the state where it is located, that the status of CBCT's under 12 U.S.C. §36 be determined in a manner which takes into careful account the actual competitive situation with respect to off-premises banking activities in the affected state.

III.

The Ruling Below Is in Conflict Not Only With This Court's Prior Decision in Plant City But With That of Another Circuit as Well.

Even assuming, *arguendo,* that the Court of Appeals below was correct in holding that CBCT's are "branches" within the meaning of 12 U.S.C. §36(f), its judgment was nevertheless in conflict not only with this Court's *Plant City* decision but also with the very *IBAA* decision on which the Court of Appeals relied. As the court in *IBAA* recognized, its expansive definition of "branches" would make it possible for a state, by manipulating its administrative rulings, to permit state banks to use CBCT's while national banks were prevented from doing so by the state's anti-branching statute.* Such a result would, of course, flagrantly violate the principle of "competitive equality" laid down by this Court in *Plant City.* The District of Columbia Circuit declared that in such circumstances 12 U.S.C. §36(c) should be construed to allow national banks to use CBCT's.

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* IBAA (slip opinion at 57-58 and 58n.104).

The situation to which the District of Columbia Circuit was addressing itself is precisely the situation presented here. As the record below undisputedly reflects, the Illinois State Banking Commissioner permits state banks to operate off-premises banking systems that are functionally indistinguishable from CBCT's—presumably on the theory that such systems do not represent branching for purposes of state law. Although these facts—and the District of Columbia Circuit's analysis of the law—were both before the Court of Appeals below, it totally ignored them and ruled that the national banks in Illinois must discontinue their operation of CBCT's. In so ruling, the Court of Appeals placed itself in square conflict with the District of Columbia Circuit.

The *IBAA* court clearly perceived that a blind application of its broad definition of "branch," far from enhancing "competitive equality", in some circumstances could have just the opposite effect. Indeed, the court seemed to recognize that, unless due account were taken of potential abuses by state regulatory authorities, its definition of "branch" simply could not be justified. In short, the District of Columbia Circuit called for a liberal construction of 12 U.S.C. §36(c), not just as a matter of statutory symmetry, but because such a construction is mandated by the principle of "competitive equality" enunciated by this Court. The Court of Appeals' failure to understand this led it into irreconcilable inconsistency with the rulings of both this Court and the District of Columbia Circuit—a conflict in decisions that requires prompt resolution by this Court.

For the foregoing reasons, First National respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-1083, 76-1084

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff-Appellee, Cross-Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Nos. 76-1085, 76-1086

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff-Appellee, Cross-Appellant,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 75 C 2027, 75 C 3144
HUBERT L. WILL, *Judge.*

Argued May 24, 1976 — Decided May 27, 1976

Before CLARK, *Associate Justice,** SWYGERT and BAUER, *Circuit Judges.*

* Honorable Tom C. Clark, Associate Justice (Retired), Supreme Court of the United States, sitting by designation.

Per Curiam. These two cases—consolidated for argument—are among a series of six cases filed in the federal courts in the last year involving the question of whether off-premises electronic bank facilities known as Customer Banking Communication Terminals (CBCT) are branch banks within the meaning of the National Bank Act, 12 U.S.C. § 36(f).[1] See *Independent Bankers Association of America* v. *Smith,* 402 F.Supp. 207 (D.D.C. 1975), affirmed March 23, 1976, ... F.2d ..... (C.A.D.C. 1976); *State of Missouri ex rel. Kostman* v. *First National Bank in St. Louis,* ..... F. Supp. ....., now on appeal in the Eighth Circuit; *State of Colorado ex rel. Bloom* v. *First National Bank of Fort Collins,* 394 F. Supp. 979 (D. Colo. 1975), on appeal in the Tenth Circuit; and *State of Oklahoma ex rel. State Banking Board* v. *Utica National Bank and Trust Company,* ..... F. Supp. ..... (N.D. Okla. 1975). In the latter two it was held that CBCT was not branch banking, while in the remaining four the opposite conclusion was reached. In the consolidated cases before us the district court held that the CBCT facility was a branch bank under § 36(f) except with regard to the withdrawing of cash by card and payments made on installment loans due the bank. These latter functions were held not to be branch banking and were, therefore, permissible; but where either deposits were made, checks were cashed or money was lent the CBCT operated as a branch and was impermissible under § 36(f), and the banks were perma-

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[1] *McFadden Act,* 12 U.S.C. § 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

nently enjoined from using the system. A stay was granted pending appeal. We affirm the judgment of the district court save and except the holding that the withdrawing of cash and the payments on installment loans do not constitute branch banking, which we reverse.

Subsequently to the judgment in this case the opinion of the Court of Appeals for the District of Columbia in *IBAA* v. *Smith, supra,* came down which held that all of the functions performed by CBCT constituted branch banking, including both the withdrawing of cash and the payments made on installment loans due the bank. We have studied all of the opinions in these cases and have concluded that the opinion in *IBAA* v. *Smith, supra,* decides the issues involved correctly.

We see no need for an elaborate opinion in this case. Judge Will has ably covered the off-premises functions performed by CBCT as to deposits, cashing of checks and the loaning of money; Judge Wilkie in the *IBAA* v. *Smith* case has thoroughly canvassed the functions of the withdrawing of cash and the payment of installments on loans; in the latter respects we adopt the reasoning of his opinion but add the following comment as to the latter two functions.

The district court here based its conclusion on the functions of CBCT as to the withdrawing of cash and the payment of installments on loans upon the provisions of the Uniform Commercial Code (U.C.C.) and Ill. Rev. Stat. 26 § 3-104(2) which declares a check to be a negotiable instrument drawn on a bank and payable on demand; a writing signed by the maker or drawer and containing an unconditional promise or order to pay a sum certain in money; with negotiability being the essential characteristic of a check. From this the district court concluded that a card inserted into the CBCT machine to secure

money was not the cashing of a check within the meaning of U.C.C. or in the common understanding of check cashing. We cannot agree. As was said in *IBAA* v. *Smith, supra,* this "is exhalting form over substance—exactly what the Supreme Court instructed us not to do" in *First National Bank* v. *Dickinson (Plant City),* 396 U.S. at 137 (1969). The check is merely the means used by the bank to attain the desired objective, *i.e.,* the payment of the money to its customer. The card serves the same purpose as the check. It is an order on the bank. Any order to pay which is properly executed by a customer, whether it be check, card or electronic device, must be recognized as a routine banking function when used as here. The relationship between the bank and its customer is the same. Indeed, the trial court here recognized this when it characterized a CBCT withdrawal as the "functional equivalent" of a written check. And appellant Continental Bank gives the card transaction the same significance:

> "The EFTS (Electronic Funds Transfer Systems) at issue in the present case are, *extensions* of the principle of immediate access to customer accounts *in a manner dispensing with underlying paper such as checks.*" Emphasis added. See brief of the Bank supporting its motion for summary judgment, page 8 (No. 2027).

Moreover, although U.C.C. defines a check as a negotiable instrument, it also provides, Section 3-104(3):

> "As used in other Articles of this Act, and as the context may require, the terms . . . 'check' . . . may refer to instruments which are not negotiable within this Article as well as instruments which are so negotiable."

Just as a transfer of funds by cable or telegraph is in law a check, *Lourie* v. *Chase National Bank,* 42 N.Y.S. 2d 205 (Sup. Ct. N.Y. Co. 1943), despite the non-negotiability of the cable, the card here for the purpose of withdrawing

cash is a check. What must be remembered is that the foundation of the relationship between the bank and its customer is the former's agreement to pay out the customer's money according to the latter's order. See White and Summers, Uniform Commercial Code 1972 at 551. There are many ways in which an order may be given and one way of late is by computer record. *Transport Indemnity Co.* v. *Sieb,* 178 Neb. 253 (1965). And the Ninth Circuit accepts the same concept that computer impulses constitute sufficient writing to meet the order test. *United States* v. *DeGeorgia,* 420 F.2d 889 (1969). Finally a CBCT order is a transaction that springs from a written agreement between the bank and its customer that clearly makes CBCT withdrawals a routine banking function performed at the main office and clearly within the branch definition as declared by Representative McFadden's own analysis of the Section at the time of its adoption:

> "Sec. 7(f) [36(f)] defines the term 'branch.' Any place outside of or away from the main office, where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch if it is legally established under the provisions of this Act." 68 Cong. Rec. 5816 (1927).

It, therefore, is plain to us that the cash withdrawal and payments on installment loans functions of the CBCT system are also business transactions carried on at the main office and are therefore within the branch definition of § 36(f).

AFFIRMED IN PART AND
REVERSED IN PART.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

75 C 2027

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

vs

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant.

75 C 3144

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

vs

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant.

ORDER

These actions came on for decision on cross motions of the plaintiff and the defendants for summary judgment, and for the issuance of permanent injunctions enjoining the operation by the defendants of what are known as Customer Bank Communication Terminals (CBCTs).

The issues having been duly briefed, considered, and an opinion having been filed, IT IS HEREBY ORDERED AND ADJUDGED:

1. That the defendants' motions for summary judgment are denied, and that the plaintiffs' motion for summary judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED:

2. That the defendants, Continental National Bank and Trust Company of Chicago, and The First National Bank of Chicago are permanently enjoined from operation of Customer Bank Communication Terminals which permit deposits to be made at such terminals, permit funds to be transferred between the accounts of a customer, or permit the borrowing of funds in any amount through the use of bank credit cards or otherwise, all as determined in the opinion entered herein.

3. The foregoing injunction is stayed pending an appeal to the United States Court of Appeals for the Seventh Circuit on condition:

a. That such appeal be expedited by the parties, and,

b. That no additional CBCTs be put into operation during the period of the stay, which perform any of the functions set forth in paragraph 2 hereof.

ENTER
Hubert L. Will
JUDGE

Date Dec. 30, 1975

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

75 C 2027

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,

Defendant.

75 C 3144

STATE OF ILLINOIS, ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Plaintiff,

v.

THE FIRST NATIONAL BANK OF CHICAGO,

Defendant.

MEMORANDUM OPINION

This opinion disposes of cross motions for summary judgment filed by Continental Illinois National Bank (Continental) and First National Bank (First National) as well as the State's Commissioner of Banks and Trust Companies in related cases brought by the Commissioner. The state seeks declaratory and injunctive relief with respect to the defendant's use of Customer Bank Communication Terminals (CBCTs). Specifically, the issue is whether or not CBCTs are "branches" under the McFadden Act,

12 U.S.C. §36, and subject to the Act's proscriptions regarding branch banking.

1. THE FACTS

The parties have entered into stipulations of uncontested facts which we adopt and incorporate by reference herein. In substance, they are as follows.

Continental currently operates two unmanned CBCTs located at 2 Illinois Center and in the Chicago North Western Railroad Station. These terminals are on-line machines connected directly to one of Continental's main office computers. Communication between CBCTs and the main office computer is by telephone lines which carry electrical impulses back and forth approximately one per second. The lines are leased from the Illinois Bell Telephone Company.

At both CBCTs, Continental customers and depositors, using their Continental Banking cards, are allowed to:

a) withdraw cash (in the amount of $25.00 or any multiple thereof, up to $100.00) from their savings, checking or credit card accounts;

b) deposit checks or currency in a checking or savings account. At the time of the transaction, the customer is given a receipt at the CBCT indicating the amount and date of the deposit; it is not credited to his account and he may not draw on it until it is received and verified at the main banking premises;

c) transfer funds between accounts: checking to savings, credit card to checking, or savings to checking; and

d) make payments on Continental Bank installment loans or credit card charges.

For all of the foregoing functions, the procedure for operating the terminals is essentially the same. First, the customer inserts his Continental Banking Card into the CBCT, thus activating the Terminal. This card contains an electronic funds transfer system (EFTS) access number. The CBCT scans the card's magnetic tape. If the card is damaged, it will be returned to the customer. If it has expired, it will be "captured", i.e., retained by the machine. If the card is neither returned nor captured, the CBCT will instruct the customer to build a "message" to be sent to Continental's main computer. The customer has 90 seconds to enter the first item in the "message", his Personal Identification Number (PIN), a randomly generated number used to verify that the customer addressing the CBCT is the proper user of the card. If he fails to enter his PIN within 90 seconds, the card will be captured.

After entering his PIN on the amount keyboard (the amount window remains dark during this time), the customer is instructed to select the type and amount of the transaction he desires to effect, first, by pressing a key on the transaction keyboard and then by entering the total dollar and cents amount on the amount keyboard. This amount will be displayed in the amount window.

If the customer requests cash in an amount that cannot be dispensed by the machine, which is supplied only with packets of $25.00, the card will be returned and the customer will be asked to begin again. If the amount is one that the machine can dispense, and the customer sees that it is stated correctly in the amount window, he presses the "enter" key. If the amount or type of transaction shown in the window is incorrect, the customer presses the "clear" key and begins again.

When the "enter" key is depressed, the CBCT sends a message over the telephone wires to the Bank's main computer. This message contains the customer's EFTS access number, his PIN, and the transaction request he has entered. The main computer which receives this information is an IBM 370 containing several files kept on "disc" (a type of storage medium for data). These include customer authorization files, indexed by EFTS access number; a file of PINs, carried in a scrambled pattern to prevent unauthorized access or accidental discovery; a transaction log file to record the day's work; and a maintenance history file.

When the message is received, the main computer checks first to be sure that there is an EFTS master record that matches the access number sent by the CBCT. If there is no such record, the card is assumed to have been issued by another bank and the computer will instruct the CBCT to return it to the customer. If the EFTS Master Record is located, then the PIN in the request is matched to the scrambled number in the PIN master file. If they do not correspond, a message will be sent back to the CBCT asking the customer to try again. If, after two more attempts, the customer still has not entered the correct PIN, the main computer will instruct the CBCT to capture the card which it will do.

If the PIN entered by the customer is correct, the main computer will then check to make sure that the customer has not exceeded the daily withdrawal limit or the maximum limit on overall use of his card. If he has exceeded these limits, the CBCT will be instructed to return the card. If the customer is within the proper limits, the main computer will go on to check the validity of the transaction requested. It will verify first that the necessary ac-

counts actually exist and, if so, are not restricted. If this information is in order, the main computer will check the "capture code" to determine whether the card has been revoked or suspended in which case the CBCT will be instructed to capture the card. If the card is not listed in the "capture code", the main computer will send an authorization reply to the CBCT Terminal.

The CBCT will respond to this reply by continuing with the next step in the transaction. In the case of a deposit or payment transaction, a drawer will open and the customer will be asked to place in the machine an envelope containing his payment or the items to be deposited. Once it is in the machine, the envelope is stamped with a receipt number in the sequence of the day's business. A receipt carrying the location and the number of the CBCT, the expiration date of the card, the type of transaction, the date and time, the Bank's own identification number, the customer's account number, the type of transaction (for a second time), the amount, and the statement that "All transactions are subject to proof and verification" is printed in duplicate at the same time. One copy is dispensed to the customer and one is retained in the machine. When the receipt is dispensed, the CBCT sends back to the main computer a completion status message (CSM). On receipt of the CSM, the main computer will record the transaction on its EFTS master record for the transaction just completed.

After being authorized by the main computer, the other types of transactions proceed in a similar manner. When the customer has requested cash, he will receive the appropriate number of $25.00 packets and a receipt with the information set out above. When the customer has requested a transfer of funds between accounts or has au-

thorized payments out of his accounts, he will receive only the appropriate receipt.

Continental also plans to open CBCTs at 62 Chicago Area Dominick's Stores. These terminals will be used for the same kinds of transactions referred to earlier as well as for payment of goods and services purchased by the customer at Dominick's. The only significant difference in the procedure is that a Dominick's employee will operate the machine for the customer.

Defendant First National is presently operating 5 CBCTs at four locations in the City: Rush-Presbyterian St. Luke's Medical Center, Avon Products, Baxter Laboratories, and the Time-Life Building. These were installed as part of First National's "bank at work" program and for a short period, from August 25 to September 23, 1975, the bank's personnel were soliciting and opening new accounts among employees at the CBCT locations. As of November 1, 1975, First National's CBCTs were to be operated "on-line" and unmanned. First National's CBCTs perform the same functions and are operated in essentially the same manner as those of Continental.

Both banks opened the CBCTs following an interpretive ruling of the United States Comptroller of the Currency (Ruling of December 12, 1974 as modified May 8, 1975) wherein he held that the terminals were not "offices within the meaning of 12 U.S.C. §36(f) and even if a CBCT is considered to be a branch office, branch agency, or branch place of business, it is not receiving deposits, paying checks, or making loans within the meaning of 12 U.S.C. §36(f)." In their motions, defendants argue that, as a matter of law, the CBCTs are not branches within the meaning of the Act.

II. THE LAW

Title 12 U.S.C. §36(c) allows national banking associations with the approval of the Comptroller of the Currency (Comptroller) to operate new branches when, where and how state law would allow state banks to operate such branches. *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Section 36(f) defines the term branch as follows:

> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The leading case construing 12 U.S.C. §36(f) is *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969). In that case, the Court was called upon to determine whether an armored car messenger service or an off-premises receptacle for the receipt of packages containing cash or checks for deposit constituted a branch within the meaning of the Act. The First National Bank in Plant City, Florida (Plant City First National) had received permission from the Comptroller to operate these two services. The armored car messenger service was advertised by the bank as a mobile drive-in. Checks could be cashed, deposits taken, and, through a "dual control contract," commercial customers could arrange for the car to bring them cash and pick up deposits at their places of business. The armored car was manned by a teller and a driver-guard. Pursuant to contracts between the customers using the service and the bank, deposits were not deemed to be made until the cash or checks were delivered to a teller at the banking house. Conversely, checks were

deemed to be cashed when cash was handed to the messenger and not when delivered to the customer by the armored car.

The stationary off-premises receptacle for receipt of deposits was located in a shopping center one mile from Plant City First National's banking house in a space leased by the bank. The facility consisted of a secured receptacle and night base, together with a writing table supplied with envelopes and transmittal slips. As with the armored car, the messenger who collected the funds from the receptacle was deemed to be an agent of the customer, the funds were not deemed to be deposited until delivered at the bank's premises, and the bank provided insurance for the funds. Since the state of Florida prohibited state banks from having more than one place of business or from transacting business at more than one place, the Court was confronted with whether the activities of Plant City First National authorized by the Comptroller constituted branch banking.

After an extensive analysis of the history and underlying policy of the National Bank Act's branching provisions as well as the federally defined elements of branching, the Supreme Court concluded that the services offered by Plant City First National were branches as defined in Section 36(f) and an attempt to secure for national banks branching privileges which were denied to competing state banks.

As was noted by the Supreme Court in *Walker Bank, supra,* and reiterated in *Plant City,* the passage in 1927 of the McFadden Act, which afforded branching privileges to national banks only to the extent of state authorized state branch banking, was in response to a trend observable during the first quarter of the twentieth century.

During that period the substantial growth in some states of state banks with branches threatened to impair and possibly eventually destroy the national banking system.[1] The McFadden Act was designed to establish "competitive equality" between state and national banks with respect to branching, the question of the desirability of branch banking to be left up to each state. As pointed out in *Walker Bank, supra,* this policy of "competitive equality" survived an attempt during the economic depression to permit national banks to branch irrespective of state law. Accordingly, the Supreme Court in *Plant City* concluded:

> The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and build into the federal statute a self-executing provision to accommodate to changes in state regulation. 396 U.S. at 133.

The Supreme Court in *Plant City* also recognized that, while branching by national banks is permissible only to the extent permitted by state law, what constitutes branching is defined by Federal law. The following language is illustrative of its position:

> We reject the contention made by *amicus curiae* National Association of Supervisors of State Banks to the effect that state law definitions of what consti-

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[1] There was no specific authority in the National Bank Act of 1863 for branching by National Banks. *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1923). Consequently, at the turn of the century there were very few branch banks in the country. Only five national banks and 82 state banks were operating branches with a total of 119. By the end of 1923, there were 91 national banks and 580 state banks operating a total of 2,054 branches. *First National Bank* v. *Walker Bank,* 385 U.S. 252, 257 (1966).

tutes "branch banking" must control the content of the federal definition of §36(f). [footnote omitted] Admittedly, state law comes into play in deciding how, where, and when branch banks may be operated. *Walker Bank, supra*, for in §36(c) Congress entrusted to the States the regulation of branching as Congress then conceived it. But to allow the States to define the content of the term "branch" would make them the sole judges of their own powers. Congress did not intend such an improbable result, as appears from the inclusion in §36 of a general definition of "branch." On this point the language of the Court of Appeals perhaps overstated the relation of state law to the problem, since the threshold question is to be determined as a matter of federal law, having in mind the congressional intent that so far as branch banking is concerned "the two ideas shall compete on equal terms and only where the States [allow] their own institutions [to] have branches." In short, the definition of "branch" in §36(f) must not be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank, supra*. 396 U.S. at 133-134.

Referring to the §36(f) definition of branching, the Court concluded:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch": by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more. It should be emphasized that since §36(f) is phrased in the disjunctive, the offering of any one of the three services mentioned in that definition will provide the basis for finding that "branch" banking is taking

> place. Thus not only the taking of deposits but also the paying of checks or the lending of money could equally well provide the basis for such a finding. 396 U.S. at 135.

The Supreme Court has, therefore, definitively interpreted the McFadden Act with respect to the definition of branching and the underlying policy of the branching provisions.

A. *The Comptroller's Ruling*

On December 11, 1974, the Comptroller issued an interpretive ruling (effective December 24, 1974) which held both as a matter of law and sound policy that CBCTs may be operated by national banks without regard to restrictions in the federal law regarding branching. This holding followed a comprehensive review of the branching statute's background and purposes.

The Comptroller initially held that CBCTs were not branch banks, branch offices, branch agencies, additional offices, or branch places of business. He based this ruling on the impossibility of consummating at a CBCT certain banking transactions associated with a banking office or place of business. These included opening an account with the bank, applying for a loan, purchasing savings bonds, obtaining money orders, cashiers checks or travellers checks, cashing travellers checks, maintaining a safe deposit box, exchanging currency, and engaging in any of a large number of other common retail banking transactions. As additional support for this conclusion, the Comptroller, citing portions of the legislative history, determined that Congress at the time it passed the McFadden Act defined branches in relation to teller windows, which were understood in both functional and physical terms as large and separate facilities. He characterized CBCTs as more closely analogous to mail boxes or tele-

phones through which a customer may communicate with the bank to accomplish certain routine transactions, or to certain routine activities which were approved as non-branching in Supreme Court decisions antedating the McFadden Act.[2]

Alternatively, the comptroller held that, even if a CBCT could be considered a branch office, branch agency, or branch place of business, it does not receive deposits, pay checks or make loans within the meaning of 12 U.S.C. §36(f). Continuing his analysis, the Comptroller held that deposits at unmanned terminals are not made until the cash or checks are received and verified at the bank, cash withdrawals are not made pursuant to the writing of a check but upon the presentation of a card, and cash withdrawals on the basis of a credit card or authorized overdraft are not loans because they are effectuated pursuant to a previously approved line of credit and are subject to verification. At the manned terminals, he concluded, the transfers between customer and store accounts are consummated at the bank and cash withdrawals are from the store rather than the bank. Finally the Comptroller distinguished the contractual arrangements for the operation and use of CBCTs from those governing deposits and withdrawals from the armored car messenger service and deposit receptacles in *Plant City, supra,* by holding that, with respect to the use of CBCTs, they have a significant purpose other than removal of the possibility that monies received will become deposits within the meaning of §36(f).

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[2] In *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1923), the Supreme Court endorsed a 1911 opinion of Attorney General Wickersham which held that a difference exists between the mere appointment of agents to receive and collect money and to forward it to the bank, and the establishment of branch banks at which a general banking business is carried on.

In analysing the competitive impact of the use by national banks of CBCTs, the Comptroller placed considerable emphasis upon the use of these terminals by Savings and Loan Associations and Credit Unions pursuant to new regulations promulgated by the Federal Home Loan Bank Board, 30 F.R. 23991, and the Credit Union Administration, 39 F.R. 30107. The Comptroller maintained that the McFadden Act protects the health of the national banking industry from impairment resulting from the loss of customers to savings and loans and credit unions.[3]

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[3] On May 19, 1975, the Comptroller modified his ruling following a hearing held on April 2 and 3, 1975, at which testimony was received from 35 witnesses. The hearing was held to reconsider 12 CFR §7.7491, the ruling of December 12, 1974, pursuant to the suggestion of Senator McIntyre, now Chairman of the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, that the Comptroller might have overlooked several policy considerations in announcing his ruling and that it would have been useful to have a hearing. A similar suggestion was made by the Independent Bankers Association of America in connection with a petition filed by the IBAA seeking a recission of the Comptroller's interpretation. Based on written statements submitted in response to his January 16, 1975 notice of proposed rule-making and on facts that came to the Comptroller's attention through hearings held on March 14, 1975 before the Senate Subcommittee, the Comptroller found no reason to alter his legal conclusions. Several modifications were made, however, which reflect the experimental nature of the CBCTs and were designed to facilitate the combined development of the CBCTs under appropriate monitoring. The modifications did not go to the substance of the December 12, 1974 ruling with the possible exception of a limitation requiring that no CBCT could be located more than 50 miles away from the bank's main office. The Comptroller suggested that he perceived no danger of the use of CBCTs to penetrate new markets. He suggested, however, that the limitation would be useful to allay the fears of market penetration expressed on behalf of small banks.

B. *District Court Decisions*

Three United States District Courts have ruled on the validity of the Comptroller's interpretive ruling. *State of Colorado ex rel. Bloom* v. *First National Bank of Fort Collins,* 394 F.Supp. 979 (D.Col. 1975); *Independent Bankers Association of America* v. *Smith,* ..... F.Supp ....., (D.D.C. Decided July 31, 1975); and *State of Missouri ex rel. Kostman* v. *First National Bank of St. Louis,* 75 113 C(1), (E.D. Mo., decided 11/17/75).

In *Bloom,* the CBCT was located at a shopping center approximately 2.8 miles from the main bank building, was not connected with the computer center at the Bank's main office building but operated electrically as a self-contained unit off-line and was unmanned by any personnel. It could be operated by bank customers who had cards which had been encoded with certain information on a magnetic strip. The information consisted of a six digit personal identification number, the customer's checking account or savings account number, his Master Charge number, the number of withdrawals permitted to him each day and the expiration date. The cards used to activate the CBCT could be either Master Charge or a "First 24 Card." The customer initiated the transaction by inserting his card into a slot on the unit and tapping out his personal identification number. The machine would make the identification from the previously encoded information and signal the customer to select one of the available transactions. If the identification was not made, the card was retained in the machine and no transaction was accomplished. As with the terminals in the instant case, those in *Bloom* allowed withdrawals from checking or savings accounts, advances on Master Charge cards, deposits in the form of checks or currency, and transfers from savings to check-

ing and vice versa. At the beginning of each day two persons opened the unit, replenished the cash supply, and transported to the main office the deposits and transaction forms used to identify the type and time of transaction. There the deposits and forms were verified, processed and forwarded to the computer center where the appropriate account was charged.[4] Colorado law prohibited branch banking with the exception of permitting one detached facility within a limited radius of the bank's premises.

Considering the Supreme Court's decisions in *Walter Bank* and *Plant City, supra,* the Court concluded that, similar to the receptacle in *Plant City,* the machine was a place at which deposits were received. Accordingly, the Court held that the machine was prohibited branch banking to the extent of this single function. The Court further held that 1) the transfer of funds between accounts was not a deposit; 2) because the machine would not cash a check, i.e., a written draft, the machine was not a place where checks were paid. The Court explained that, even though the result is the same, the method of communication is different, i.e., instead of a written order there is the depressing of a button. The latter process, the Court continued, is comparable to wire transfer of funds by commercial customers. Finally, the Court held that the machine is not a place where money is lent because, whether the customer obtains prepackaged currency against "Master Charge" or "Balance Plus" (an overdraft of a checking or savings account), he is drawing against a prearranged line of credit. The Court stated that there is no

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[4] Colorado banks were accustomed to receiving deposits in the mail and extending lines of credit to commercial customers who signed master notes and banks regularly made transfers between accounts in different banks.

functional difference between using credit cards to obtain cash and using them to obtain services or products.

Since there was no showing of express authorization for state banks to use the machine to receive deposits, the Court refused as irrelevant additional evidence on the question of banking practices in Colorado. It held simply that, so long as the machine accepted deposits, it was a prohibited branch.

In *Smith, supra,* the Court held that the Comptroller's holding that CBCTs were neither branch offices, banks, agencies, or additional offices or branch places of business within the meaning of the Act and that they did not cash checks, take deposits, or make loans, violated the clear wording of the statute, its legislative history, significant case law and the facts. Quoting from the Supreme Court's decision in *Plant City* and the following language from Representative McFadden relating to Section 26, the Court held that the Comptroller's determination was without merit.

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting any business carried on at the main office, is a branch. 68 Cong. Rec. 5816 (1927).

The Court held the Comptroller's ruling null and void in that it violated the National Bank Act.

In *Kostman, supra,* the Court held, without discussion, that machines performing the same functions as the CBCTs here in question constituted branch banking within the meaning of 12 U.S.C. §36(f).

III. ANALYSIS

The state of Illinois prohibits branching by state banks. Illinois Revised Statutes, Chapter 16½, §106 provides:

> No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

Upon examination of the functions of CBCTs, we conclude that certain of their operations constitute branching within the meaning of 12 U.S.C. §36(f) and are, therefore, proscribed by §36(c).

Relying upon the Comptroller's analysis, the banks argue that the functions performed at the CBCTs do not fall within the parameters of the federal definition, because, in actuality, deposits are made, checks paid, and money lent at the bank's main premises.

A. *Deposits*

Defendants argue that because the customer is only given a receipt upon depositing checks or currency at the CBCT and because the customer's account is not credited and he is not able to draw on it until it is received and verified against records kept at the main banking premises, deposits actually take place at the bank's premises.

The Supreme Court in *Plant City* dealt with the question of whether a deposit should be determined to have been made upon the creation of the debtor-creditor relationship (receipt and verification) or upon the receipt of the

deposit at a place away from the main banking office. Referring to the legislative purpose of competitive equality between state and national banks, the Court concluded that an advantage was certain to accrue to a bank which maintained a remote place where deposits could be physically received. Accordingly, both the armored car and the deposit receptacle were held to be places for the receipt of deposits within the meaning of §36(f), notwithstanding the contractual terms which provided that no deposit would be credited to the customer's account until physically delivered to the bank.

The Court's analysis in *Plant City* compels a similar conclusion with respect to CBCTs. Even though the customer's EFTS master record is updated immediately to reflect a deposit made at the CBCT, a factor not present in *Plant City,* the crediting of a deposit made at a CBCT is subject to receipt and verification at the main office. The physical receipt of deposits by the machines, notwithstanding contractual arrangements, constitutes "receipt of deposits" under §36(f) as interpreted in *Plant City.* The additional factor of immediate transmission of deposit-related information made possible by the on-line communication between the terminal and the banks' main computer only buttresses the conclusion that the deposit occurs at the time of receipt at the terminal rather than at the bank.

Defendants attempt to attribute significance to the distinction between off-line CBCTs, such as the one found in *Bloom, supra,* and on-line CBCTs such as those in the instant case. The reality of virtually immediate recording of an on-line CBCT initiated deposit transaction by the bank's main computer obviously makes the CBCT a more sophisticated and useful place for receiving deposits than were the receptacle and the armored messenger car in

Plant City or the off-line CBCT in *Bloom*. This does not, however, alter the location of the place where the deposit is made by the customer.[5] The logical extension of defendants' argument would require a finding that deposits received at an off-premises building occupied by bank personnel who took them and wired the information regarding them to the main office's computer, were made at the main office if, pursuant to contract, funds were not finally credited to the customer's account until the main office received and verified the deposit. In consequence, a manned physically remote branch would not constitute a branch under Section 36(f). Under *Plant City* and, in fact, deposits entered at CBCTs are made at the terminal rather than at the bank and the CBCT is, accordingly a branch.

Relying on a statement in the District Court's decision in *Bloom, supra,* defendants argue that the transfer of funds between two accounts of the same customer does not constitute a deposit. They contend that authorizing the bank to make such transfers entails no physical exchange of funds and is pure communication which can be accom-

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[5] In this connection, defendants rely on *Bloomfield Federal Loan Ass'n* v. *American Community Stores Corp.,* 396 F.Supp. 384, 387088 (D. Neb. 1975). The Remote Service Units (RSUs) in *Bloomfield* were capable of transferring funds, withdrawing from savings accounts, depositing in savings accounts, receiving payments related to loans, and other related financial services. The Court held that the regulation governing branches by federal savings and loan associations, 12 CFR §545.14, were not applicable to RSUs due to their *sui generis* characteristics as a means of communication. Noting the non-applicability of the National Bank Act's provisions to federal savings & loan associations and the different standard employed by the Federal Home Loan Bank Board in refusing to authorize branching, the Court held that RSUs were not branch savings and loans. Because of the existence of different standards, this holding is not persuasive authority for a similar holding in the instant case.

plished in the same manner by telephone or mail.[6] We disagree.

After the customer's requested transfer of funds between accounts has been authorized by the bank's main computer he receives a receipt which verifies the transfer. The customer is thus able to accomplish a deposit of funds into his savings or checking accounts at a place remote from the bank's main premises. Furthermore, a qualitative difference exists between the mere telephoning or mailing of the requested transfer. Since the CBCT is clearly a "place" within the Supreme Court's language in *Plant City,* the transfers must be deemed to be consummated by the customer at a place provided by the bank other than the bank's main premises. What happens simply is that the customer withdraws funds from one account, an act not covered by §36(f), and deposits them in another account, a transaction constituting branch banking under that section.

Even considering the somewhat complicated clearance process which precedes the main bank computer's authorization of the transfer, the deposit obviously initiates at the CBCT, and the receipt supplied by the CBCT indicates that the transfer has been consummated. Immediately thereafter, the customer's EFTS master record is updated and the transfer is complete. In the case of mailing or telephoning, no place owned by the bank is involved. The customer simply mails or telephones the requested transfer from an indeterminate location. The defendants' at-

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[6] The defendants also point to Ill. Rev. Stat., Ch. 16½ §102, which excludes from the definition of branch "any place where only records . . . are made, posted, or kept." The functions of a CBCT are generically dissimilar to those of places used for information storage. Records are neither made, posted, nor kept at CBCTs.

tempts to use bank-by-mail and bank-by-telephone analogies breaks down under §36(f)'s two-pronged standard. The off-premise CBCT is a *place* owned by the bank where deposits are received in the form of a customer's withdrawal of money from his checking, savings, or credit card account into his checking or savings account. These conclusions apply equally to deposits effectuated at the POS terminals.[7]

Payments on installment loans or credit card accounts, however, do not constitute deposits inasmuch as they are payments on existing loan obligations or credit card account balances and not the deposit of funds in an account which is subject to future withdrawals by the customer.

B. *Cashing Checks*

The plaintiff urges that, using the practical substantive approach which *Plant City* requires, the withdrawals permitted at CBCTs must be considered the cashing of checks. He contends that a check is whatever is recognized by the bank as an order. We do not agree.

The Uniform Commercial Code, which has been adopted in Illinois, provides at 3-104(2), Ill. Rev. Stat. Ch. 26 §3-104(2), that a check is a negotiable instrument which is drawn on a bank and payable on demand. Section 3-104 defines a negotiable instrument as a writing which is signed by the maker or drawer, contains an unconditional promise or order to pay a sum certain in money and no other prom-

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[7] No substantive difference lies in the distinction between deposits that are made directly into an account because of money or checks placed into the CBCT, and those credited immediately to the customer's account by virtue of transfer from a retailer's account to a customer's account following the customer's presentation of a check to the retailer.

ise, order, obligation or power given by the maker or drawer except as authorized by Article 3, is payable on demand or at a definite time and is payable to order or to bearer. Negotiability, the transferability of the instrument (check) from the payee or holder to a third party, is the essential characteristic of a check.

The insertion of a card into a CBCT to secure $25 packets of cash up to $100 is not cashing a check within the meaning of the UCC or in the common understanding of what constitutes check cashing. No written instrument exists and no third party designation enters into the transaction. A withdrawal at a CBCT is the functional equivalent of cashing a check only with respect to a bearer instrument presented for payment by the maker. Even this analogy breaks down when the withdrawal is made from the customer's savings account upon which no checks could be written or when the cash is obtained through use of a credit card. The limited similarity between a CBCT cash withdrawal and the maker's cashing of a bearer instrument is not sufficient to transform the obtaining of cash by withdrawal from a checking or savings account or through use of a Master Charge card into cashing checks within the meaning of §36(f). The foregoing analysis is equally applicable to withdrawals consummated at POS terminals.

C. *Lending Money*

Relying on *Bloom,* defendants argue that: 1) a cash advance of a credit card is not a loan within the meaning of §36(f) because there is no functional difference between the use of a credit card to obtain goods and services and its use to obtain cash; 2) since no discretion is exercised by the bank when cash is dispensed at CBCTs and since the extension of credit involves a discretionary decision by the lender, the receipt of cash from a credit card ac-

count does not constitute a loan; 3) the loan is made when the customer's line of credit on the account is approved and not at the time of withdrawal which, in any event, is subject to verification at the bank; and 4) that at Dominick's the insertion of the store's employee as an intermediary removes any possibility of it being a loan by the bank.

The initial difference in the function of a credit card to obtain cash at a CBCT and its use to obtain goods and services from a merchant is that the latter engenders the running of interest from the end of a predetermined period for payment, usually 25 or 30 days after receipt of a statement, while the former causes interest to run from the time of withdrawal. Although a loan may be generally defined as a contract whereby one delivers money to another who agrees to return an equivalent sum at a future time, a significant aspect of a loan is the running of interest, the charging of which is a uniform custom in the banking industry. See 7 Zollmann, *Banks and Banking*, §§4823, 4825.

The contracts underlying the issuance of credit cards with respect to cash advances are, in effect, agreements to make small loans to the customer at some future presentation of a valid card. That agreement does not transfer any funds and, therefore, is not a loan as urged by defendants. Nor is interest charged with the opening or establishing of a line of credit. The funds are transferred and interest commences when the CBCT disburses the requested number of $25 packets up to $100.00. That is when and where the loan is made. Many holders of bank credit cards never use them to obtain funds and, therefore, never make any loans with them although the line of credit is available.

It should be noted that, while only a maximum of $100.00 may be borrowed on any given day, the total amount which may be borrowed over a series of days is the maximum line of credit previously established.

It is not accurate, therefore, to contend that the establishment of the line of credit constitutes the making of the loan since, if funds are borrowed on more than one day against the available maximum, the additional funds will not be delivered and interest will not start to run on them until the later date or dates.

The simple use of a credit card to obtain goods or services from a merchant is distinguishable from its use at a CBCT to obtain cash on two grounds. First, the bank has not established a *place* for the dispensing of the goods or services pursuant to the use of the credit card. Second, the use of the credit card to obtain goods or services from a merchant does not commence the running of interest. If payment is made within the specified payment period, no interest accrues at all.

In addition to securing goods or services through use of the bank charge card, a holder may also obtain cash at a retail store CBCT installation. Thus, loans are also made at POS terminals. The participation of the store's employee does not cause a significant difference in the operation of these manned terminals and the unmanned CBCTs. Instead of the customer operating the machine, he presents his card to the store's employee who completes the operation. Although the actual funds received upon withdrawal from the customer's credit card account come from the store's cash on hand, the appropriate debit and credit entries are made to the customer's and store's accounts, and interest immediately starts to run on the customer's

loan. Accordingly, POS terminals, as well as CBCTs, are places where money is lent to the bank's customers within the meaning of §36(f).

IV. DEFENDANTS' ADDITIONAL CONTENTIONS

Additional arguments put forth by defendants include: 1) the competitive equality between National and State Banks will not be disrupted by CBCTs; 2) the Illinois Commissioner of Banks is permitting practices analogous to CBCT banking to exist in Illinois; and 3) the McFadden Act should not be interpreted in such a way as to preclude the introduction into the banking system of new computer technology designed to provide banking customers with greater convenience in banking.

A. *Competitive Equality*

Defendants argue that, because EFTS technology would be available to state banks through franchising agreements with the large national banks and because small banks will need to use these systems if they are to avoid losing their share of the market to competing non-bank financial and non-financial institutions, the local monopolies of small state banks, which Illinois anti-branching laws seek to protect, will be enhanced and not weakened or destroyed by the introduction of CBCTs and their use by state banks under franchise from the large national banks. In addition, they contend that, since the state of Illinois, unlike the state of Florida in *Plant City,* already permits substantial off-premises activities, bank-by-mail, bank-by-telephone, and chain banking, the operation of CBCTs, which are merely a more technologically advanced form of these banking activities, will not result in any competitive advantage to national banks and, therefore, under *Plant*

City and the underlying purposes of the McFadden Act, the Act's definition of branch should not be applied to CBCTs.

The first part of defendants' argument is answered by reference to the purpose of the McFadden Act. As pointed out by the Supreme Court in *Walker Bank, supra,* the legislative history indicates that Congress intended "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." Since the Congress did not intend to give national banks a competitive advantage, it left the decision of whether to allow branching to the states, permitting national banks to branch to the extent allowed by the state. The legislative history of the McFadden Act does not express a concern for the competitive position of state banks *vis a vis* other state financial and non-financial institutions. Such a concern may not be used to permit national banks to engage in branching activities where states do not permit it.

The second part of defendants' argument is answered by reference to the clear language of the statute:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: . . . at any point within the state in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

No Illinois statute specifically grants Illinois banks authority to have electronic branches. Accordingly, if, as

we are compelled to conclude, CBCTs are branches, the foregoing language forecloses national banks from employing them in Illinois.

In addition, although inquiry into the impact of CBCTs on the competitive position of state and national banks is relevant in construing "branch", it is not a separate test for the existence of a branch. Rather, it is, at most, an adjunctive inquiry, buttressing or diminishing the finding that a bank's deposit, check cashing or lending activities constitute branching. The Supreme Court in *Plant City* did not make a factual analysis of banking activities permitted in Florida that could be considered competitive with the messenger and receptacle services in question. It simply held (p. 136):

> Because the purpose of the statute is to maintain competitive equality, it is relevant in construing "branch" to consider, not merely the contractual rights and liabilities created by the transaction, but all those aspects of the transaction that might give the bank an advantage in its competition for customers. Unquestionably, a competitive advantage accrues to a bank that provides the service of receiving money for deposit at a place away from its main office; the convenience to the customer is unrelated to whether the relationship of debtor and creditor is established at the moment of receipt or somewhat later.

A similar competitive equality analysis here compels the same conclusion. National banks using CBCTs will have a competitive advantage over state banks not currently permitted to use them. It, therefore, reinforces our finding that CBCTs are branches performing banking activities within the meaning of §36(f).

B. *Analogous Illinois Practices*

Defendants contend that the Commissioner's approval of the Check-Mate system, which has been instituted by state savings and loan associations in cooperation with state banks validates the CBCTs under Illinois law. Also, defendants complain that the Commissioner has taken no action with respect to the Heritage Moneymatic 365.

The Check-Mate system allows savings and loans depositors to obtain a free-checking account in a designated Illinois state bank. The initial deposit to the state bank checking account is made through the S&L to the bank. Subsequent deposits may be made either through the S&L or directly to the bank. The Commissioner argues that the S&L is an agent of the customer. Defendants, however, contend that it is an agent of the bank. The Commissioner held that these activities do not constitute branching under state law.

The question of agency is interesting but irrelevant. The Check-Mate system is clearly distinguishable from CBCTs. The latter consists of facilities owned by the bank to accomplish two of the three activities set out in §36(f). It cannot be seriously argued that the S&L is a branch of the bank or vice versa. We assume that, if national banks desire to establish similar arrangements with S&Ls, they may do so. It does not follow, however, that they may therefore set up CBCT branches.

The foregoing analysis applies equally to the Moneymatic 365 system whereby a customer of any one of the several Heritage Group banks may withdraw money from his checking account by the insertion of his Moneymatic 365 card into a machine located on the premises of any of the other listed banks. Not only, as we have held, do such withdrawals not constitute check-cashing, but, as the

presence in the group of the First National Bank of Lockport indicates, national banks are not precluded from engaging in these activities.

C. *New Technology and Development*

Finally, the defendants urge that we should interpret the McFadden Act in such a way that banking customers may enjoy the conveniences available through new electronic computer technology. They also suggest that the recent branching of federally chartered savings and loans in Illinois and the expansion of their services make it appropriate to permit national banks to provide the additional services to their customers available through CBCTs so as to enable the banks to compete with the savings and loans. The Comptroller in his opinion holding CBCTs not to be branches stressed the competition of branching savings and loans as one of the reasons why national banks needed to utilize CBCTs to maintain their competitive position.

We are sympathetic to the substantive considerations underlying both arguments. The public should be permitted, unless other and superior considerations preclude it, to enjoy the benefits of modern technology. Moreover, we are well aware, having written the opinion in *Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Bd.*, 377 F.Supp. 11 (N.D.Ill. 1974), which held that the Federal Home Loan Bank Board had the power, under its enabling legislation, to grant branch charters to federal savings and loan associations in Illinois, that savings and loan branches are burgeoning in this state, and that banks may very well be suffering competitively.

Unfortunately, the language of the McFadden Act establishes a relatively simplistic test as to what constitutes a branch bank. It was enacted in 1927 at a time when

banks performed far fewer functions and services than they do today. The three services, the performance of any one of which constitutes a branch, represent a fraction of the myriad of activities carried on daily by even the smallest national bank.

There were, of course, no electronic computers in 1927 and no savings and loans. The Home Owners Loan Act was not passed until 1933.

The problem which the McFadden Act sought to solve was the increase in branching of state banks in those states which permitted them to have branches while national banks were not allowed branches regardless of what state law permitted state banks to do. Accordingly, Congress adopted a simple formula. If a particular state authorizes branches for state banks, the Comptroller may permit national banks in that state to have branches. What constitutes a branch, however, was defined by the Congress.

The 1927 McFadden Act is, we believe, obsolete and should be reexamined in the light of current competitive conditions and modern technology. Its language is, however, clear and unambiguous. If a facility owned by a bank is a place "at which deposits are received, or checks paid, or money lent," it is a branch under the Act. However desirable CBCTs may be in providing better service to bank customers and enabling banks to compete with branching savings and loans, it is clear, as previously indicated, that they receive deposits and lend money. They are, therefore, branches. Whether or not they should be is a question properly within the province of the Congress and not the Courts.

Conclusion

In the light of the foregoing, we hold that the functions performed by CBCTs, both unmanned and manned, constitute making a deposit or lending money within the meaning of 12 U.S.C. §36(f) with the exception of cash withdrawals from checking or savings accounts and payments on installment loans and credit card accounts. Additionally, we hold that cash withdrawals as presently effectuated at CBCTs do not constitute cashing checks. Since under *Plant City, supra,* the bank's maintenance of a *place,* off-premises, where either deposits are made, checks are cashed, or money is lent, amounts to branch banking, CBCTs must be so characterized. Accordingly, defendants' motion for summary judgment is denied. Plaintiff, on the other hand, is entitled to summary judgment and a permanent injunction against defendants' use of CBCTs either manned or unmanned.

Hubert L. Will
United States District Judge

Dated: December 29, 1975

APPENDIX C

STATUTES INVOLVED

Federal Statutes:

The definition of "branch" in the McFadden Act, as amended, 12 U.S.C. § 36(f):

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

The limitations on "branches" of national banks in the McFadden Act, as amended, included in 12 U.S.C. § 36(c):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

Illinois Statutes:

Section 6 of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 106 (1975):

> No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at

any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

Section 2 of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 102 (1975):

In this Act, unless the context otherwise requires,

* * *

A "banking house", "branch bank", "branch office", or "additional office or agency" within the meaning of the prohibitions of Section 6 hereof shall include any branch bank, branch office or additional house, office, agency or place or business at which deposits are received or checks paid, or any of a bank's other business is conducted, but shall not include any place at which only records thereof are made, posted, or kept. A place at which deposits are received or checks paid or any of a bank's other business is conducted shall not be deemed to be a branch bank, branch office or additional house, office or agency if such place is adjacent to and connected with the main banking premises, or if it is separated from such main banking premises by not more than an alley; provided always that (i) if such place is separated by an alley from the main banking premises there is a connection between the two by public or private way or by subterranean or overhead passage, and (ii) if such place is in a building not wholly occupied by the bank, such place shall not be within any office or room in which any other business or service of any kind or nature other than the business of such bank is conducted or carried on. A place at which deposits are received or checks paid or any of a bank's other business is conducted shall not be deemed to be a branch bank, branch office or additional house, office or agency if

such a place is a facility established and maintained in accordance with subsection 15 of Section 5 of this act.

Section 5(11) of the Illinois Banking Act, Ill. Rev. Stat. ch. 16½, § 105(11) (1975):

A bank organized under this Act or subject thereto shall be a body corporate and politic and shall, without specific mention thereof in the charter, have all the powers conferred by this Act and the following additional general corporate powers:

* * *

(11) Notwithstanding any other provisions of this Act, to do any act and to own, possess and carry as assets property of such character, including stock, which is at the time authorized or permitted to National Banks by an Act of Congress, but subject always to the same limitations and restrictions as are applicable to National Banks by the pertinent Federal law.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-17

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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October Term, 1976

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THE FIRST NATIONAL BANK OF CHICAGO,

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

To what extent does the operation of electronic banking machines by national banks off their premises constitute branch banking within the meaning of 12 U.S.C. §36(f).

ARGUMENT

This case involves the identical issues presented in the companion case of *Continental Illinois National Bank and Trust Company of Chicago* v. *State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies.* Accordingly, we refer the Court to our Brief in Opposition to the Petition for Writ of Certiorari filed by Continental (No. 75-1900) and adopt our arguments therein in opposition to First National's petition in this case.

As support for their petition, First National curiously relies almost entirely on narrow state law issues which were raised and rejected by the courts below. Such reliance, of course, does not advance their petition for review by this Court.

Thus, the bank disingenuously argues that the operation "without apparent challenge by the Commissioner" of an off-premises system by certain banks in Illinois mandates the granting of the writ and the reversal of the opinion of the Seventh Circuit. A careful review of the record in this case reveals that the operation has never been expressly approved, has been monitored continuously by the Commissioner, and action will be forthcoming as appropriate pending disposition of these matters.

Furthermore, the argument makes the tenuous assumption that practices never expressly condoned assume the posture of state law and can govern the banking industry in our entire state.

Likewise, First National's position relative to section 5 (11) of the Illinois Banking Act (Ill. Rev. Stat. 1975, Chap.

16½, §105[11]) was argued and rejected by the lower courts. And, its usefulness is highly questionable due to the fact that 12 U.S.C. §36(c) requires *express* authorization from state law before national banks can branch.

Finally, the argument that the opinion below conflicts with that of the District of Columbia Circuit in *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921 (D.C. Cir. 1976) is patently unsupported and clearly made only to induce action by this Court. In fact, the Seventh Circuit adopted the *IBAA* opinion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

Pursuant to Supreme Court Rule 24(5), the State of Illinois submits this supplemental brief in opposition to the petition for a writ of certiorari filed by the First National Bank of Chicago* in order to apprise this Court

* This supplemental brief applies also to the companion case before this Court also on petition for a writ of certiorari, *Continental Illinois National Bank and Trust Company v. State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies* (No. 75-1900)

of the opinions in the following two cases which deal with the same subject matter as the decision of the Seventh Circuit sought to be reviewed here: *State of Missouri, ex rel. W. R. Kostman, Commissioner of Finance v. First National Bank in St. Louis*, 76-1056 (8th Cir., July 20, 1976); *State of Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 75-1523, 75-1611, 75-1612 (10th Cir., August 20, 1976) copies of which are appended as Appendix A and B.

Furthermore, at page four of its petition, First National Bank alludes to a City of Chicago Ordinance which permitted "banks located in Chicago to establish and operate an unlimited number of CBCT's in Chicago." On August 19, 1976, the Honorable Raymond Berg of the Circuit Court, Cook County, Illinois entered an order declaring that ordinance unconstitutional as permitting branch banking under Illinois law and thus contrary to Article 13, Section 8 of the Illinois Constitution. A copy of that order is appended as Appendix C. That order is now on appeal to the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 76-1056

STATE OF MISSOURI, ex rel. W. R. KOSTMAN, Commissioner of Finance,

Plaintiff-Appellee,

v.

FIRST NATIONAL BANK IN ST. LOUIS, a National Banking Association,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

SUBMITTED: May 14, 1976 — FILED: July 20, 1976

Before HEANEY and HENLEY, *Circuit Judges*, and SCHATZ, *District Judge.**

PER CURIAM.

The First National Bank in St. Louis appeals from the decision of the District Court finding that the Bank's operation of customer-bank communication terminals (CBCTs) constituted the operation of branch banking within the meaning of 12 U.S.C. § 36(f). The District Court found that this conclusion mandated the further finding that the Bank maintained more than two branch banks and was, therefore, in violation of 12 U.S.C.

* ALBERT G. SCHATZ, District Judge, District of Nebraska, sitting by designation.

§ 36(c). The District Court enjoined the appellant from operating the CBCTs in question or the utilization of any similar machines. The court later, however, suspended the permanent injunction pending appeal. We affirm the findings of the District Court.

12 U.S.C. § 36(f) provides:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(c) provides that a national bank may establish, with the approval of the Comptroller of the Currency, branch banks within a state provided that state banks are also permitted by state statute to establish and maintain similar type and number of branch bank facilities. The case law clearly establishes that national banks are limited in this manner in order to provide for "competitive equality" in branch banking. *First National Bank v. Dickinson*, 396 U.S. 122, 133 (1969); *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Nebraskans for Ind. Banking v. Omaha Nat. Bank*, 530 F.2d 755, 760 (8th Cir.) (en banc), *vacated and remanded on other grounds*, 44 U.S.L.W. 3698 (U.S. June 10, 1976) (No. 75-1382); *Driscoll v. Northwestern National Bank of St. Paul*, 484 F.2d 173, 175 (8th Cir. 1973). Section 362.107 R.S. Mo. (1969), provides that state banks may operate only two facilities in addition to the main banking office, upon approval of the State Financial Commissioner.

The stipulated facts show that the First National Bank in St. Louis is a national banking association having its principal place of business at Broadway and Locust Streets in the City of St. Louis, Missouri. The Bank also conducts business at two additional separate facilities in the City of St. Louis. On December 18, 1974, the Bank placed in operation two Douctel Total Teller machines (CBCTs) at locations separate and apart from the other offices of the Bank.

It is further stipulated that these machines have the capacity to receive deposits, to transfer funds between different kinds of accounts within the parent banking facility, to accept payments on obligations to the Bank by either deposit or transfer and to provide cash in prepackaged amounts of $25, $50, $75 and $100 to a customer of the bank properly operating these machines.

The definition of branch banking in 12 U.S.C. § 36(f) is in the disjunctive. The offering of any of the services listed therein, receiving deposits, paying checks or lending money, when performed at a location "apart from the chartered premises," provides a basis for concluding that branch banking is taking place. *Nebraskans for Ind. Banking v. Omaha Nat. Bank, supra* at 759.

Our review of this record discloses that the machines in question are capable of receiving deposits and crediting the amount deposited to the customer's account. The ability of the CBCT machine, when properly operated, to perform this banking transaction at a location "apart from the chartered facility" constitutes branch banking. *Independent Bankers Association of America v. James E. Smith, Comptroller of the Currency of the United States*, No. 75-1786, slip op. at 35-43 (D.C. Cir. March 23, 1976). *See also State of Illinois ex rel. Richard K. Lignoul, etc. v. Continental Illinois National Bank and Trust Company of Chicago*, Nos. 76-1083, 76-1084 (7th Cir. May 27, 1976).[1] As the First National Bank of St. Louis already performs banking functions at three separate locations, the installation and use of the CBCT machines at two other locations constitutes a violation of 12 U.S.C. § 36(c).

We affirm the decision of the District Court and order the permanent injunction reinstated.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1] Because 12 U.S.C. § 36(f) is in the disjunctive and we find that the CBCT machines can accept deposits, we do not need to consider whether these machines can also cash checks or lend money within the meaning of 12 U.S.C. § 36(f).

APPENDIX B

PUBLISH

United States Court Of Appeals

Tenth Circuit

Nos. 75-1523, 75-1611, 75-1612

STATE OF COLORADO, ex rel., STATE BANKING BOARD, and HARRY BLOOM, STATE BANK COMMISSIONER and CHAIRMAN, STATE BANKING BOARD,

Plaintiffs-Appellants and Cross-Appellees,

v.

FIRST NATIONAL BANK OF FORT COLLINS, and JAMES E. SMITH, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Defendants-Appellees and Cross-Appellants.

and

THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

Appeal from the United States District Court
for the District of Colorado
(D.C. Civ.A. 75-M-397)

Mary J. Mullarkey, First Assistant Attorney General (J.D. MacFarlane, Attorney General, Jean E. Dubofsky, Deputy Attorney General, and Edward G. Donovan, Solicitor General, on the brief), for Plaintiffs-Appellants and Cross-Appellees.

William H. Brown for First National Bank of Fort Collins and Michael Kimmel, Department of Justice, for James E. Smith, Comptroller of the Currency (Ward H. Fischer, Fischer, Brown, Huddleson & Gunn, for First National Bank of Fort Collins, and Rex E. Lee, Assistant Attorney General, James L. Treece, United States Attorney, Ronald R. Glancz, Department of Justice, and C. Westbrook Murphy and Edward Jiran, of Counsel, for the Comptroller of the Currency, on the brief), for Defendants-Appellees and Cross-Appellants.

James F. Bell (Peter B. Work, Jones, Day, Reavis & Pogue, on the brief), for the Conference of State Bank Supervisors, as Amicus Curiae.

Before BREITENSTEIN, MCWILLIAMS, and DOYLE, Circuit Judges.

MCWILLIAMS, Circuit Judge.

This appeal concerns the efforts of the First National Bank of Fort Collins, Colorado to install an electronic banking facility, commonly known as a customer-bank communications terminal (CBCT), in a regional shopping center situate approximately two miles from its main bank building located in downtown Fort Collins. This CBCT permits the Bank's customers, through the use of a coded card, to transact any of the following: (1) deposit funds to the customer's account by placing checks or currency in an envelope and inserting the envelope into a slot in the face of the machine, tapping out the amount of the deposit on the face of the machine and pressing a button to indicate whether the deposit is to be credited to a checking or savings account; (2) withdrawing a prepackaged packet of either $25 or $50 in currency from the machine and debiting such withdrawal to either the customer's checking or savings

account, or charging it to a Master Charge Account or a Balance Plus Account; or (3) transferring funds from the customer's savings account to his checking account, or vice versa. See the trial court's memorandum opinion and order for a detailed statement as to the manner in which a CBCT functions. Colorado *ex rel.* State Bank Board v. First National Bank, 394 F.Supp. 979 (D. Colo. 1975).

The first National Bank of Fort Collins, hereinafter called the Bank, is a national bank. On December 12, 1974, the Comptroller of Currency issued an interpretative ruling which allowed national banks to make available to their customers one or more CBCT's. In his ruling the Comptroller declared that the use of such devices at locations other than the main office did not constitute branch banking. Acting pursuant to the ruling of the Comptroller, the Bank, as above indicated, installed a CBCT in a shopping center two miles away from its offices in downtown Fort Collins.

The State of Colorado expressly prohibits branch banking, with the exception that, subject to certain conditions, a bank may maintain one detached facility within 3,000 feet of its premises. C.R.S. 1973, 11-6-101(1). The State of Colorado, acting through the State Board of Banking, determined, to its satisfaction, that the CBCT installed and operated by the Bank in the shopping center two miles removed from its main office was a branch bank and prohibited under both federal and state law.

It was in this general setting that the State of Colorado, *ex rel.* State Banking Board, brought the present proceeding against both the Bank and the Comptroller. The gravamen of the complaint was that the Bank was engaging in branch banking in violation of federal and state law and sought declaratory judgment and permanent injunction. A hearing on a preliminary injunction was by agreement treated as the hearing on permanent injunction.

The trial court concluded that the use of the Bank's CBCT for receiving deposits constituted branch banking in violation of 12 U.S.C. § 36, but that the other functions of the CBCT did not constitute branch banking and were valid under the Comptroller's interpretative ruling. Upon the Bank's assurances that it would follow the trial court's declaratory judgment without the necessity for an injunction, the trial court granted no injunctive relief.

The State Banking Board now appeals the judgment of the trial court that the withdrawal of money and the transfer of funds from a savings account to a checking account through the use of the CBCT does not constitute branch banking. The Bank and the Comptroller by cross-appeal challenge that part of the trial court's judgment which declared that the receipt of deposits by the CBCT violated the federal statute regarding branch banking.

The Comptroller, but not the Bank, challenges the standing of the plaintiffs to maintain the present proceeding. The trial court concluded that the plaintiffs did have standing to seek declaratory judgment, citing United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); and Jackson v. First National Bank of Valdosta, 349 F.2d 71 (5th Cir. 1965). We agree that these plaintiffs have standing.

We also agree with the conclusion of the trial court that the off-premises CBCT, insofar as it receives deposits, constitutes branch banking in violation of 12 U.S.C. § 36. In this regard we, like the trial court, find the instant case to be controlled by First National Bank in Plant City v. Dickinson, 396 U.S. 122 (1969). In accord, *see* Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976); Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900); and Missouri *ex rel.* Kostman v. First National Bank, No. 76-1056 (8th Cir., July 20, 1976).

As indicated, the trial court additionally concluded that as concerns withdrawals and transfers, the Bank's off-premises CBCT was not acting as a branch bank, and that such did not offend 12 U.S.C. § 36. With this conclusion we are not in accord.

Since the trial court entered its judgment in the instant case, two Circuits have considered this precise matter, i.e., whether the withdrawal of funds from either a checking account or a savings account, or the transfer of funds from one to the other, through the use of an off-premises CBCT is in violation of the federal rule on branch banking. Both Circuits held that such is in violation of 12 U.S.C. § 36. We agree with the result reached by those Circuits. We feel no need to here elaborate on the matter. It is sufficient to say that we subscribe to Independent Bankers Association v. Smith, 534 F.2d 921 (D.C. Cir. 1976) and Illinois *ex rel.* Lignoul v. Continental Illinois National Bank and Trust Co., No. 75 C-2027 (7th Cir., May 27, 1976), *petition for cert. filed*, 45 U.S.L.W. 3005 (U.S. June 30, 1976) (No. 75-1900).

The reasoning of the trial court in the instant case was that the *manner* in which Bank's CBCT permitted the withdrawal of prepackaged packets of money, with a corresponding debit to the customer's checking or savings account, and also permitted the transfer of funds from one account to another, did not constitute "checks paid" or "money lent" as those terms are used in 12 U.S.C. § 36(f). Such reasoning in our view unduly emphasizes form at the expense of substance and fails to follow the admonition of the Supreme Court in *Dickinson* that "§ 36(f) must not be given a restrictive meaning that would frustrate the congressional intent this Court found to be plain in Walker Bank [First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252]." The congressional intent referred to in *Walker Bank* was to place national and state banks in a position of "competitive equality" insofar as branch banking is concerned.

Actually, in our view it was not necessary for the trial court in the instant case to find that in permitting withdrawals and transfer of funds, the CBCT fit neatly and precisely into the traditional molds of "checks paid" or "money lent" as those terms are used in 36(f). That section declares that the term "branch" shall *include* any branch place of business where deposits are received or checks paid, or money lent. In this regard the Supreme Court in *Dickinson* commented as follows:

> Although the definition may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

In line with the foregoing, then, accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank of the present time provides many other services. In this general regard the Supreme Court in *Dickinson* in a footnote at 396 U.S. 134, n.8, quoted the following statement of Representative McFadden concerning the definitional section of the Act:

> Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office*, is a branch. (Emphasis added.)

In our view, then, the withdrawal of funds and the transfer of funds from one account to another is a traditional banking transaction which comes well within the prohibition of the statute. And such, we believe, is true regardless of the particular technique used to accomplish the withdrawal or transfer.

Our holding here is in complete accord with the rationale of First National Bank of Logan v. Walker Bank & Trust Co., 385 U.S. 252 (1966). There, as above mentioned, the Supreme Court held that the congressional intent behind the provisions of 12 U.S.C. § 36 was to place national and state banks on a basis of "competitive equality" as far as branch banking is concerned. Colorado law on branch banking precludes a state bank from maintaining off premises a machine of the type here sought to be used by the Bank. Accordingly, as concerns the use of off-premises CBCT's, we are by this opinion maintaining competitive equality in Colorado.

There is the suggestion that this is a form of customer service which is to the best interest of the banking public. Such may well be the case. However, this argument should be addressed to the legislative branch of government. The judiciary must apply the statutory law as it has been enacted.

The judgment insofar as it declares the receipt of deposits by the Bank's off-premises CBCT is in violation of 12 U.S.C. § 36 is affirmed. The judgment insofar as it declares the withdrawal of funds or the transfer of funds by the Bank's off-premises CBCT is not in violation of 12 U.S.C. § 36 is reversed. The case is remanded for further proceedings.

APPENDIX C

In The Circuit Court of Cook County, Illinois
County Department, Law Division

No. 76 L 12571

STATE OF ILLINOIS, ex rel., RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies,

Plaintiff,

v.

CITY OF CHICAGO, a Municipal Corporation; JOHN C. MARCIN, City Clerk, City of Chicago; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO; THE FIRST NATIONAL BANK OF CHICAGO,

Defendants.

JUDGMENT ORDER

This cause coming on for a hearing before this Court, all parties being present by counsel and the Court having considered the various motions and memoranda filed by the parties and having heard testimony on behalf of defendants,

THE COURT HEREBY FINDS:

1. That the activities contemplated and included within the "Chicago Financial Services Ordinance" relative to "electronic banking machines" and "community offices" viz:

> "b) "Community Office" means any office maintained by a financial institution separate and apart from its main office, at which office such financial institution
>
> 1) solicits loans for such financial institution

2) gives information about any aspect of its business

3) answers customers' inquiries concerning any business which such customers have with the financial institution, or

4) furnishes advice to customers concerning any of their business with such financial institution.

c) "Electronic Banking Machine" shall mean any mechanical device not operated by a financial institution employee, such as an automatic teller or point of sale terminal by means of which

1) cash or other items may be placed for deposit in any account at such financial institution

2) transfers of funds may be made from one account at such financial institution to another account at such financial institution

3) cash may be withdrawn from any account at such financial institution

4) the proceeds of loans from such financial institutions may be disbursed

5) bills of such financial institutions or of third parties may be paid by debiting any account at such financial institution, or

6) the balance in any account at such financial institution may be ascertained."

are, in fact and in law branch banking under Illinois law;

2. That if the Court had considered and admitted the testimony of all the witnesses presented by the City of Chicago, it would have found that this ordinance would benefit the City and does pertain to its government and affairs;

3. The Court finds that the Constitution of the State of Illinois (Article 13, Section 8) expressly provides that the authority to conduct branch banking may only be granted by an extraordinary vote of the Illinois General Assembly and the "Chicago Financial Services Ordinance" therefore conflicts with this express constitutional provision and is unconstitutional;

4. Having found the ordinance unconstitutional, the Court finds it unnecessary to consider the other objections to the ordinance urged by the plaintiff;

5. There is no genuine issue of fact and plaintiff is entitled to summary judgment as a matter of law;

6. The Court finds that this is a case in which the public interest requires prompt adjudication by the Supreme Court of Illinois.

IT IS THEREFORE ORDERED:

1. That the applications to intervene as defendants of Continental Illinois National Bank and Trust Company of Chicago and the First National Bank of Chicago are granted, plaintiff's objections being of record;

2. That plaintiff's motion to strike the pretrial memorandum of defendants is denied;

3. That the motion of plaintiff to strike the testimony and exhibits is granted;

4. That the motion of plaintiff for summary judgment on the amended complaint as further amended is granted;

5. That the defendants City of Chicago and John C. Marcin and their successors, agents and all persons acting under their supervision are permanently enjoined from in any way placing the "Chicago Financial Services Ordinance" in force and effect and from accepting and otherwise processing notices or applications from financial institutions seeking to open "community offices" and/or "electronic banking machines" pursuant to said ordinance;

6. That the defendants Continental Illinois National Bank and Trust Company of Chicago and the First National Bank of Chicago and their successors, agents and all persons acting under their supervision are permanently enjoined from opening "community offices" and/or "electronic banking machines" pursuant to the "Chicago Financial Services Ordinance" or otherwise acting pursuant to the Chicago Financial Services Ordinance."

_____, 1976

Enter: Judge Raymond K. Berg

Circuit Court Judge

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Supreme Court, U. S.
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No. 76-17

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

REPLY TO BRIEFS FOR RESPONDENT AND AMICUS CURIAE IN OPPOSITION

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THE FIRST NATIONAL BANK OF CHICAGO,

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STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

REPLY TO BRIEFS FOR RESPONDENT AND AMICUS CURIAE IN OPPOSITION

STATEMENT

Petitioner, The First National Bank of Chicago ("First National"), on July 9, 1976, filed with the Court its Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit ("First National's Petition"). On August 10, 1976, Respondent, State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies, State of Illinois ("Commissioner"), filed a brief ("Commissioner's Brief") in opposition to First National's Petition.

On August 13, 1976, Independent Community Banks in Illinois ("ICBI") sought leave to file a brief ("ICBI's Brief") opposing the petition for a writ of certiorari filed in the related case of *Continental Illinois National Bank and Trust Company of Chicago* v. *State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies, State of Illinois* (No. 75-1900).* ICBI has requested the Court to consider its brief in conjunction with First National's petition as well.**

This brief replies to the Commissioner's Brief and ICBI's Brief.

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* The decision of the Court of Appeals is now reported at 536 F. 2d 176 (7th Cir. 1976).

** ICBI's Brief at 7.

ARGUMENT

I.

FIRST NATIONAL'S ARGUMENTS REGARDING ILLINOIS STATE BANKS' OPERATION OF OFF-PREMISES SYSTEMS RELATE TO THE IMPORTANT CONGRESSIONAL POLICY OF COMPETITIVE EQUALITY UNDERLYING THE McFADDEN ACT* AND NOT TO "NARROW STATE LAW ISSUES", AS THE COMMISSIONER CONTENDS.

The Commissioner's principal argument rests on the premise that First National's Petition "relies almost entirely on narrow state law issues".** This statement is inaccurate and misleading. First National submits that the uncontroverted evidence that the Commissioner's administrative policies favor off-premises systems for Illinois state banks bears decisively on the congressional policy of "competitive equality" underlying the McFadden Act (12 U.S.C. §36).

Fundamental to an appropriate construction of 12 U.S.C. §36 is careful consideration of the effect of that construction on the "competitive equality" of state and national banks in Illinois. Such consideration is not a "narrow state law issue", as the Commissioner has attempted to characterize it. If First National were to be prevented from operating its CBCT system, when the Commissioner

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* 12 U.S.C. §36.

** Commissioner's Brief at 2.

is permitting Illinois state banks to operate identical or analogous off-premises systems, the consequence would be the destruction of the "competitive equality" between state and national banks in Illinois which the McFadden Act was designed by Congress to assure.*

The Commissioner and ICBI assert that the Illinois state banks' off-premises systems discussed in First National's Petition at 7-9 were never expressly approved by the Commissioner. This patently misstates the record, which includes a ruling letter from the Commissioner's Chief Examiner in Chicago expressly authorizing one of the two off-premises systems discussed by First National in this case. Moreover, the Commissioner conceded, on deposition, that he agrees with that ruling letter.**

Further, the record conflicts with the Commissioner's assertion that the second off-premises system (Moneymatic 365) operated by certain Illinois state banks "has been monitored continuously by the Commissioner, and [that] action will be forthcoming as appropriate pending disposition of these matters." *** Neither the record herein nor any subsequent action by the Commissioner of which First National is aware indicates that the Commissioner has monitored continuously or plans to take any action with respect to this second off-premises system. The unrefuted fact is that both off-premises systems continue to operate to this day.

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* *See First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969) ("Plant City").

** Deposition of Richard K. Lignoul taken on October 14, 1975, at 23-24 (a part of the record in this case).

*** Commissioner's Brief at 2.

II.

THE LEADING CASES ON BRANCH BANKING ACKNOWLEDGE THE NECESSITY OF SCRUTINIZING ACTUAL STATE ADMINISTRATIVE PRACTICE IN ORDER TO PRESERVE "COMPETITIVE EQUALITY" UNDER THE McFADDEN ACT.

ICBI's Brief * at 14-15 argues that the Commissioner's administrative practice in permitting Illinois state banks to operate off-premises systems which are identical or functionally equivalent to First National's CBCT system does not support a decision that First National should be permitted to operate its CBCT system. Yet the opinion of the *IBAA** Court, on which ICBI and the Commissioner so heavily rely, plainly says that when state banks are permitted to operate off-premises systems by administrative practice, and not express state statute, a "narrow reading of [12 U.S.C.] section 36(c) would resurrect the precise form of competitive inequality which the McFadden Act was designed to cure." ** The *IBAA* Court goes on to state that in cases, such as the instant case, where the administrative practice plainly favors off-premises facilities, that Court would "refuse to frustrate legislative intent by a narrow reading of 12 U.S.C. §36(c)."***

The thrust of First National's Petition is that the *actual* administrative practice of the Commissioner must be considered in deciding whether the McFadden Act permits the operation of First National's CBCT system. The

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* *Independent Bankers' Assn. of America* v. *Smith*, 534 F.2d 921 (D.C. Cir., 1976) *("IBAA")*.

** 534 F.2d at 948 n. 104.

*** *Id.*

Court of Appeals, in failing to consider the Commissioner's *actual* administrative practice, places itself in direct conflict with the decisions of the District of Columbia Circuit in *IBAA* and of this Court in Plant City *, which also held that the McFadden Act must be construed so as not to "frustrate the congressional intent that there be competitive equality between state and national banks."

Finally, ICBI and the Commissioner argue that §5(11) of the Illinois Banking Act,** which grants to Illinois state banks all powers authorized to national banks under federal law, should not be considered in this case. Thus, ICBI argues that consideration of §5(11) would undermine the policy of the McFadden Act that state law is to be preeminent on the question of branch banking.*** First National submits that precisely the contrary is true. The consideration of §5(11) urged by First National in no way conflicts with the McFadden Act's policy, for §5(11) *is* a state law which assures that state banks will be permitted to operate off-premises CBCT systems if national banks in Illinois are permitted to do so. The Illinois policy that state banks shall always be on a competitive par with national banks obviously does not contravene the federal policy that state law is to be preeminent on the question of branch banking.

ICBI also argues that First National's interpretation of §5(11) is incorrect because §5(11) "authorizes state banks to perform only those acts *specifically authorized* to na-

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* *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 (1969).

** Ill. Rev. Stat., 1975, Ch. 16½, §105(11).

*** ICBI's Brief at 16-17.

tional banks by an Act of Congress."* Aside from the fact that ICBI has inaccurately paraphrased the actual language of §5(11), this argument begs the central question in this case, *i.e.*, whether an Act of Congress, the McFadden Act, authorizes First National to operate off-premises CBCT's. That question should be answered only after the actual Illinois administrative practices and competitive situation (including the impact of §5(11) on competitive equality in the state) have been considered. The Court of Appeals below failed to consider these critical factors. Review by this Court is therefore appropriate.

CONCLUSION

For the foregoing reasons, First National respectfully submits that the Commissioner's Brief and ICBI's Brief do not effectively respond to the matters set forth in First National's Petition. First National respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted,

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* ICBI's Brief at 16 (emphasis in text).